TEOH ENG HUAT

v.

THE KADHI OF PASIR MAS, KELANTAN & ANOR.

HIGH COURT MALAYA, KOTA BHARU
ABDUL MALEK AHMAD J
[ORIGINATING SUMMONS NO. 31-35-86]
18 MAY 1986

CIVIL PROCEDURE: *Jurisdiction - Power of Court to hear application - Subject-matter being the religion of Islam - Schedule to Courts of Judicature Act 1964.*

FAMILY LAW: *Infants - Guardianship of Infants Act 1961 - Definition of "infant" - Applicability of Act - Conversion of infant without consent and knowledge of legal father.*

CONSTITUTIONAL LAW: *Freedom to choose own religion - Articles 11, 12 of Federal Constitution - Own free will - Who has the right to decide on the infant's education and upbringing.*

The plaintiff alleged that the conversion of his daughter ("the infant") and who was below 18 years old, to the Muslim faith had taken place without his knowledge and consent. Consequently, the plaintiff applied for various declarations, *inter alia,* that the infant's conversion by the 1st defendant was null and void and that the plaintiff as the lawful father and guardian of the infant, had the right to decide the infant's religion, education and upbringing. The plaintiff also contended that the registration of the conversion of the infant into the Muslim faith in the record of the 2nd defendant (Majlis Ugama Islam dan Adat Istiadat Melayu, Kelantan) be expunged. The main issue for the decision of the Court was whether the infant had a right to choose her own religion or whether that decision could only be made by the plaintiff.

Held:

[1] The Guardianship of Infants Act 1961 ("the 1961 Act") applied to both the plaintiff and the infant in so far as the provisions were not contrary to the Muslim religion.

[2] The 1961 Act did not expressly provide for the choice of religion and reference was made by the Court to Art. 11 and 12 of the Federal Constitution.

[3] After an examination of the relevant phrases of Art. 11 and 12 of the Constitution, the Court was of the opinion that the infant had a right to choose her own religion where she does it of her own free will.

[4] In view of the 1961 Act, the plaintiff had the right to decide on the infant's education and upbringing until she attains majority subject to the condition that it does not conflict with the principles of the infant's choice of religion as guaranteed under the Federal Constitution.

Cases referred to:

In re Maria Huberdina Hertogh; Adrianus Petrus Hertogh and Anor. v. Amina binte Mohamed and Ors. [1951] 17 MLJ 12
In re Thain [1926] 1 Ch 689
In re Agar-Ellis [1878] 10 Ch D 49
Skinner v. Orde LR 4 PC 60
In re Newton [1896] 1 Ch 740
In re W [1907] 2 Ch 557

In re Maria Huberdina Hertogh; Inche Mansor Adabi v. Adrianus Petrus Hertogh and Anor. [1951] 17 MLJ 164
Re Chee Peng Quek [1963] 29 MLJ 1xxxix

Legislation referred to:
Courts of Judicature Act 1964, s. 48
Federal Constitution, arts. 11, 11(1), 12, (3), (4), 47, (1), 119(1)
Guardianship of Infants Act 1961 ss. 1(2), 1(2)(b), 2(2)(a)(ii), 3, 4, 5, 10, 11
Islamic Family Law Enactment 1983 (Kelantan), s. 92
Kelantan Council of Religion and Malay Custom Enactment 1966 (Kelantan), s. 57

Other source referred to:
Halsbury's Law's of England 4th Edn., Vol. 24, para. 517, 534

For the plaintiff - Gooi Hock Seng & Peter Huang; M/s. Shan Gooi & Huang
For the 1st defendant - Haji Halim bin Haji Mohamed, State Legal Adviser
For the 2nd defendant - Haji Yusof Nor; M/s. Yusof & Apandi

JUDGMENT

Abdul Malek Ahmad J:

According to the affidavit of the plaintiff attached to his application dated 3 February 1986, his daughter Susie Teoh @ Bee Kueu (hereinafter "the infant") was born on 5 April 1968 and was working as a clerk at Messrs. Video Ria at Jalan Tok Lam, Kuala Terengganu until the 18 December 1985 when she was discovered missing by her boyfriend, Tan Boon Hwee. After a futile search for her in Kuala Terengganu, Kuala Lumpur and Penang, the plaintiff's son-in-law, Chee Kie Chong @ Chee Chee Chong, had lodged a police report on the matter on the 21 December 1985 and had subsequently telephoned the 1st defendant's office to inquire whether the infant had recently been converted as a Muslim and was told that she had in fact been so converted on the 22 December 1985.

As the conversion of the infant was without his knowledge and consent, the plaintiff had therefore applied for the following declarations and orders:

(a) a declaration that he, as the lawful father and guardian of the infant, has the right to decide her religion, education and upbringing;

(b) a declaration that the infant shall continue to be brought up in the Buddhist faith in accordance with his wishes;

(c) a declaration that the infant's conversion into the Muslim faith made some time between 18 and 22 December 1985 by the 1st defendant, without his consent, is null and void;

(d) an order that the registration of the conversion of the infant into the Muslim faith in the records of the 2nd defendant be expunged;

(e) costs; and

(f) such further or other order as the Honourable Court deemed fit and proper.

It is relevant to mention that this application was a sequel to an earlier application for a writ of *habeas corpus* as regards the same infant made by the plaintiff against the 2nd defendant alone *vide* OS 31-23-86 dated 20 January 1986 but when that matter had come up for hearing on 2 February 1986, Counsel for the plaintiff had applied for a month's adjournment and had subsequently withdrawn the application when it came up again on 2 March 1986.

As regards this application, Counsel for the plaintiff applied on 26 February 1986 to have the matter transferred to the High Court, Penang on the grounds that there was a very large crowd outside the Kota Bharu Court premises on 26 January 1986 when the case first came up for hearing and that in view of the sensitive nature of the earlier *habeas corpus* application, there was a likelihood of a breach of the peace judging from the behaviour of certain sections of the crowd. I dismissed the application after hearing arguments from both sides as Counsel's fears were based on the assembly present on the earlier two occasions with the number having dwindled on the second and there being no assembly on the day of application but I made no order as to costs as his fears were founded at the time of filing the application. I, however, allowed an application for adjournment on the same date from Counsel for the 2nd defendant as he had just been retained and needed time to prepare.

At the subsequent hearing, the State Legal Adviser for the 1st defendant raised a preliminary objection on the question of jurisdiction as this application pertained to the Islamic religion. I had then adjourned the matter after hearing arguments to decide and on the adjourned date had overruled the preliminary objection on the grounds that I had the jurisdiction to dispose of the matter under the additional powers of the High Court as set out in the Schedule to the Courts of Judicature Act 1964. Paragraph 1 of the said Schedule gives the High Court power to issue to any person or authority directions, orders or writs for the enforcement of rights conferred by Part II of the Federal Constitution, or any of them, or for any purpose and I was of the considered opinion that the present application came under that category. I was not unaware of the provisions of s. 48 of the same Act which gave the High Court the discretion to refer the effect of any provision in the Federal Constitution to the Supreme Court but as that was merely couched in discretionary as opposed to mandatory terms, it was my view that it was best that I dealt with the application in the circumstances.

The first declaration sought was whether the plaintiff as the lawful father and guardian of the infant had the right to decide her religion, education and upbringing. I was of the opinion that, since this matter involved guardianship, the first question to decide was whether the Guardianship of Infants Act 1961 (hereinafter "the Act") applied to the plaintiff, infant and to the State of Kelantan in view of subsection (2) of s. 1 of that Act which states and I quote:

> 1(2) Nothing in this Act shall apply in any state to persons professing the Muslim religion until this Act has been adopted by a law made by the Legislature of that state; and any such law may provide that -
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> (a) nothing in this Act which is contrary to the Muslim religion or the custom of the Malays shall apply to any person under the age of the eighteen years who professes the Muslim religion and whose father professes or professed at the date of his death that religion or, in the case of an illegitimate child, whose mother so professes or professed that religion; and
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> (b) in the case of any other person, the provisions of this Act, so far as they are contrary to the Muslim religion, shall cease to apply to such person upon his professing the Muslim religion, if at the date of such professing he has completed his age of eighteen years or, if not having completed such age, he professes the Muslim religion with the consent of the person who under this Act is the guardian of the person of the infant.

It is plainly obvious that it does apply to the State of Kelantan except that it does not apply to persons in that State professing the Muslim religion until the Act has been adopted by a law made by the Legislature of that state. In Kelantan, the Islamic Family Law Enactment 1983 was enacted partly for this purpose as can be seen from s. 92 of that Enactment which reads:

92.(1) Nothing contained in the Guardianship of Infant Act 1961 which is contrary to the Islamic religion or the custom of the Malays shall apply to any person under the age of eighteen years who professes the Islamic religion and whose father professes or at the time of his death professed the Islamic religion or in the case of an illegitimate child, whose mother so professes or at the time of her death professed the Islamic religion.

(2) In the case of any other person, the provisions of the said Act, so far as they are contrary to the Hukum Syarak shall cease to apply to such person upon his professing the Islamic religion, if at the date of such professing he has completed the age of eighteen years or, if not completed such age, he professes the Islamic religion with the consent of the person who under that Act is the guardian of the person of the Infant.

There is no doubt therefore that the Act applies to the plaintiff but does it apply to the infant as it is not disputed that the infant had in fact been converted as a Muslim on the 22 December 1985? It will cease to apply, in so far as the provisions are contrary to the Muslim religion, to a person upon his professing the Muslim religion at the age of eighteen or above or, if under eighteen, he professes the Muslim religion with the consent of his guardian under the Act. Section 5 of the Act makes the plaintiff her guardian and since in view of this application she does not fall within the prescribed categories in para. (b) of subsection (2) of s. 1 of the Act, it therefore applies to her. Does she fall under para. (a) of that subsection? Although the infant had purportedly professed the Muslim religion under the age of eighteen, the second limb requiring the father to also profess that same religion has not been satisfied. In the consequence, I was of the view in the circumstances that the Act applied to both the plaintiff and the infant in so far as the provisions were not contrary to the Muslim religion. I also held that I should only be concerned as to whether the Act applied to Kelantan, where this application was filed and where the Act applied to Kelantan, where this application was filed and where the infant's conversion took place, and not to Terengganu where the plaintiff resides, although in Terengganu, the Guardianship of Infants (Adoption) Enactment 1961 had been repealed by the State Statute Law Revision Enactment 1965 but for the same reasons stated for Kelantan the Act would still be applicable to both the plaintiff and the infant.

Section 3 of the Act states that the guardian of an infant shall have the custody of the infant, and shall be responsible for his support, health and education. Under s. 4 of the Act, he is given control and management of the infant's property. Under s. 5, the father of an infant shall be the guardian of the infant's person and property in normal circumstances unless the Court orders otherwise under s. 10. At this stage, it must be pointed out that had the Court not been deprived of the opportunity of interviewing the infant whose whereabouts are not known, there is the possibility that the Court might have made an order under s. 10 of the Act read with s. 5 thereof as s. 11 of the Act provides, and this is supported by the guidelines propounded in para. 517 and 534 of *Halsbury's Laws of England* 4th Edn., Vol. 24 , that the Court shall have regard primarily to the welfare of the infant in relation to the wishes of the parents. The remaining provisions of the Act detail the ancillary matters relating to guardianship and from the reading of the Act in its totality, it is not disputed that the plaintiff in this case is, in the circumstances, in sole charge of the infant as regards her custody, support, health, education and property. The result is that he is responsible for the infant's custody, education and general upbringing but has he the final say in her choice of religion?

It is contended that education would include religious education but that, to my mind, has to be distinguished from choice of religion. In this respect, as the Act is silent on this, we have no alternative but to refer to Art. 11 and 12 of the Federal Constitution which would have in any case overridden any provision in the Act or in any other written law, if there

was any such provision, contrary to them. Clause (1) of Art. 11 reads "Every person has the right to profess and practise his religion and, subject to cl. (4), to propagate it.". Despite my painstaking perusal, I can find no definition of "person" either in the Federal Constitution nor in the Interpretation and General Clauses Ordinance 1948 which governs it and I must conclude that this applies to every person irrespective of age subject of course to the fact that he must be a person who is of sound mind and is in a position to decide. This view is strengthened by the fact that age is a criteria in several other Articles of the Federal Constitution, for example, in most of the Articles of citizenship in Part III, and in Art. 47 and cl. (1) of Art. 119. I was of the view that the infant here, at seventeen years and eight months at the time of the conversion, was surely a person who could decide for herself in the exercise of her constitutional right to profess and practise her chosen religion. I must stress here that this view is of course dependant upon the facts of each particular case as if the infant was nine or twelve at the time of the conversion, and depending on whether or not I was able to seek her personal views, I may have arrived at a different conclusion.

The question of "instruction", "ceremony" and "worship" of a religion has been classified under rights in respect of education under Art. 12 of the Federal Constitution and cl. (3) distinctly states that "No person shall be required to receive instruction in or to take part in any ceremony or act or worship of a religion other than his own." (the underlining is mine). If it had been "No person shall receive instruction in or to take part in any ceremony or act of worship of a religion other than his own" then I would agree that that was an outright prohibition but with the words "be required to" having been put in that way, it is my view that a person may do either or all of these things on his own free will where he is not "required" to do so by some other person. It was contended on behalf of the plaintiff that the fact that the infant in this case was required to recite the dua kalimah shahadah was already a "requirement" in the sense of this Clause but with respect to Counsel, I would say that that was a requirement of the ceremony itself but not the requirement for the infant to take part in the ceremony as categorically intended by cl. (3) of Art. 12. It is my understanding, therefore, that a person, in addition to his right to profess and practise his religion under cl. (1) of Art. 11, can also on his own accord receive instruction in or take part in any ceremony or act of worship of a religion other than his own. In that situation, cl. (3) of Art. 12 will only apply if he does not do it voluntarily. Who then, if he does not do it voluntarily, decides what is the religion of that person to determine what is the "religion other than his own"? In view of cl. (4) of the Article which reads:

> (4) For the purposes of cl. (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian.,

I would say that that depends on the age of that person - if he is eighteen years or above, he decides for himself and if he was under the age of eighteen, then it will be decided by his parent or guardian. It is also pertinent to emphasise here that in view of the words "For the purposes of cl. (3)" in cl. (4) of Art. 12, the said cl. (4) can only apply to cl. (3) and not generally. In the result, the constitutional principle enunciated in cl. (4) that the religion of a person under the age of eighteen years shall be decided by his parent or guardian can be applied only to the situation envisaged in cl. (3) of that Article and not to any other situation.

In view of the above considerations, I was of the opinion that cl. (3) and (4) of Art. 12 did not apply in this case as there was no evidence to support the fact that the infant had been "required" to receive instruction in or to take part in any ceremony or act of worship of a religion other than her own. "Require" in the concise Oxford dictionary is defined as "order, demand, lay down as imperative" and this illustrates an element of force or compulsion which

is notably absent in this case in view of the facts stated in the plaintiff's affidavit. Clause (4) of Art. 12 in particular is qualified by "For the purposes of cl. (3)" without which I would have had no hesitation in declaring that the plaintiff had the right to decide on the infant's religion if she was under eighteen. It is also relevant to take into account s. 57 of the Kelantan Council of Religion and Malay Custom Enactment 1966 which states that if the kadhi was satisfied that a person was a major according to Hukum Syara' he may register the person as a convert to the Islamic religion. A major according to Hukum Syara' is a person who has attained puberty which under Islamic law is at the latest 15 years of age. The infant in this case was well past that age when the conversion took place. The 1st defendant has also averred in his affidavit dated the 25 February 1986 that he had converted the infant in accordance with the law.

The first prayer also mentions "upbringing" which I would say is a general term covering support, health and education. Would "upbringing" include the right for the father to bring the infant up in the religion he wishes her to profess? The answer would of course be in the negative in view of my reasoning of Art. 11 and 12 of the Federal Constitution. To my mind, he would only have the right to decide on her general upbringing in so far as it does not conflict with her choice of religion. It is also interesting to observe in passing that, in view of the age of majority stated in s. 2(2)(a)(ii) of the Act, the plaintiff's position in this respect would still be the same if instead of having converted to the Muslim faith as in this case, the same infant had chosen on her own free will to become a Christian or Hindu at the age of 19.

In our instant case, despite the plaintiff's legal right to her custody as I was not able to interview the infant, the infant is actually no longer in his custody as can be seen from the facts stated in his affidavit. There is also no allegation by the plaintiff of kidnapping, abduction or forced conversion of the infant which only shows to prove that the plaintiff was and is fully aware that the infant had gone away voluntarily to convert herself to the Islamic faith. This is supported by the facts disclosed in his affidavit that it was the infant's boyfriend who had discovered her missing. If the infant had been in any kind of trouble, the boyfriend or the plaintiff would have been the first to know. The plaintiff's affidavit also stated that he had searched for the infant in Kuala Terengganu, Kuala Lumpur and Penang but not in Kelantan yet his son-in-law chose to call the 1st defendant's office in Pasir Mas, for reasons we do not know, to check on whether the infant had been converted. It is obvious from all these that the plaintiff had not actually disclosed in his affidavit the full facts of the matter. The plaintiff even withdrew his earlier application for *habeas corpus* as he could not pinpoint as to who had actual custody of the infant. As I have stated earlier, s. 11 of the Act gives the power to the Court or Judge, in deciding matters under the Act, to give regard primarily to the welfare of the infant and then the wishes of the parents. Unfortunately, I was not in a position to interview the infant in this case in view of the circumstances but by her actions, I would safely conclude, for the reasons stated earlier, that she had run away from her father's custody and there was every possibility that if I had managed to interview her, I may have even made an order under s. 10 of the Act read with s. 5 thereof. With her appearance, I would then have been in a better position to determine the wishes of the infant herself, which is of paramount importance in relation to the wishes of the plaintiff, as regards her custody and her choice of religion. Be that as it may, it is clear from the infant's declaration attached to the 1st defendant's affidavit dated 25 February 1986 as "WYI" that she had chosen to convert to the Islamic faith on her own free will and not out of compulsion from others.

No case authorities had been cited solely to determine the question of the choice of religion of an infant under Art. 12 of the Federal Constitution and where citation or reference has been made, the cases tend to link the fact that the guardian who has custody should also have the right to the infant's choice of religion. In *re Maria Huberdina Hertogh; Adrianus Petrus Hertogh and Anor. v. Amina binte Mohamed and Ors.* [1951] 17 MLJ 12 where a Christian girl became a Muslim following the religion of her adoptive mother, the original order of custody was further complicated by the subsequent declaration that it was a nullity by the Court of Appeal and the sudden marriage of the infant at the age of thirteen to the 3rd defendant some three days after that declaration. As regards the question of custody, the trial Judge, having made reference to the different facts in *In Re Thain* [1926] 1 Ch 689, *In Re Agar-Ellis* [1878] 10 Ch D 49, *Skinner v. Orde* LR 4 PC 60, In *Re Newton* [1896] 1 Ch 740 and *In Re W* [1907] 2 Ch 557, decided that the Court had jurisdiction to make the declaration (as regards the marriage) asked for, that the marriage was invalid and that after considering all the circumstances, the custody of the infant should be given to the mother.

On appeal *vide* In *Re Maria Huberdina Hertogh: Inche Mansor Adabi v. Adrianus Petrus Hertogh and Anor.* [1951] 17 MLJ 164 it was held that the Court in the exercise of its chancery jurisdiction had no power to make a formal declaration that the marriage was illegal and void and of no effect and therefore the judgment of the Court below must be varied by deleting that portion of it containing such declaration; that the female infant in that case was domiciled in Holland and as there was no evidence that the domicile of the appellant was Singapore, the law of Holland would be applicable to determine the validity of marriage; and that as the marriage would be void by the law of Holland the appellant had not shown that there was a valid marriage between him and the female infant and therefore the custody of the infant was rightly given to her parents.

It is clear from the decision of the appeal Court that although they decided that the trial Court had no power to formally declare the marriage illegal and void and of no effect, they also decided that in view of the domicile of the parties, the validity of the said marriage should be determined by the law of Holland and because of the failure of the appellant to show that there had been a valid marriage between him and the infant, the custody was rightly given by the trial Court to the parents. What then, would have been the position if there had been no marriage at all? If the appellant had succeeded in showing that he was domiciled in Singapore and not Holland and the marriage held to be valid, would he then as the husband have been given custody in place of the parents?

Although the question of the infant's right to her choice of religion was not the main issue and the appeal Court only confined itself to the question of custody of the infant and the validity of the marriage, it is pertinent to note that the question of the infant's religion including her choice of it was actually dealt with in the judgments of all three Judges hearing the appeal. Foster Sutton CJ in his judgment had this to say:

> I now turn to the question whether the infant is, in law, to be deemed to be a Christian, within the meaning of the Christian Marriage Ordinance, 1940. In the Court below and before us, it was submitted that if the infant is, in the eyes of the law, a Christian, the marriage between her and the appellant was invalid that is to say *void ab initio*, by virtue of the provisions of that Ordinance, s. 3 of which reads as follows:
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> > Every marriage between Christians and every marriage between persons one of whom is a Christian shall be solemnised in accordance with the provisions either of this Ordinance or of the Civil Marriage Ordinance, 1940, and every such marriage solemnised otherwise than as provided in this section shall be invalid.

On behalf of the appellant it was argued that the learned trial Judge misdirected himself as to the true meaning of the cases he was referred to, and that a distinction must be drawn between the legal right of a father to determine the religion his child shall follow until it reaches majority, and the fact that the infant in this case was a Muslim on 1 August 1950, the date upon which the marriage ceremony took place.

On behalf of the respondents it was submitted that in the eyes of the law the infant in this case is a Christian, that is to say it follows the religion of its father, until it ceases to be a minor, and that, in law, during its minority a child has no capacity of election or choice.

During the course of the arguments a number of cases were cited which support the proposition that, where the father has, or is entitled to, the custody of a child, unless he has, (1) by his gross moral turpitude forfeited his rights, or (2) by his conduct abdicated his paternal authority, the Court will treat his wishes as paramount, In *re Agar-Ellis.* In *Skinner v. Orde* and the other cases cited the Courts were being asked, in effect, to determine the religious teaching the infant concerned was to be permitted to follow.

While it is the case in para. 16 of his affidavit the infant's father states:

> I have been a Christian throughout my life, I have never consented, and would never have consented, to my daughter, Huberdina Maria Hertogh, becoming a Mohammedan,

and there is no suggestion that he has been guilty of any conduct which would justify the Court in overriding his wishes, in arriving at a conclusion on this question it must be remembered that a "Christian" is defined in s. 2 of the Christian Marriage Ordinance as meaning "a person professing the Christian religion". The issue, therefore, which we have to determine is now what religious teaching the infant should be deemed, or permitted, to follow, but whether on the date of the marriage, the 1 August 1950, she was "a person professing the Christian religion" within the meaning of the Ordinance. That is the real issue on this particular aspect of the case. What is the evidence on the point?

The infant was born on 24 March 1937, her father is a Dutch subject and a Christian. On 10 April 1937, she was baptised in the Roman Catholic Church of St. Ignatius at Tjimahi, in Java, by a Roman Catholic priest named Father de Koster, and up to December, 1942, when she commenced to live with one Che Aminah binte Mohamed, she was brought up in a Roman Catholic environment. From then until 1 August 1950, she was brought up in a Muslim environment, and at some stage between the two dates she embraced the Muslim faith. In this connection the learned trial Judge, in his judgment, says:

> Judged by the standard of a European child she is older than her years.
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> As the child is thirteen years of age I thought it right to see her in my chambers and to satisfy myself concerning her wishes. It is neither necessary nor desirable, nor would it be right, to record the various impressions which I formed, except to say that I am satisfied that it is her desire to remain in this country and to continue in the Muslim faith. Having regard to her environment it would have been surprising if she had expressed a contrary wish. Nevertheless, I am satisfied that those are her present wishes and that they are genuine and sincere.

In the face of the evidence and the opinion expressed by the learned trial Judge, I am unable to agree with the proposition that on 1 August 1950, the infant should be deemed to be "a person professing the Christian religion", within the meaning of the Christian Marriage Ordinance, 1940. It follows, therefore, that, in my view, the Ordinance in question is not applicable to the present case; and I do not think that the cases cited, in which totally different issues arose for determination, are of any real relevance to the issue before us.;

and Spencer Wilkinson J in the relevant passage of his judgment said:

> It was argued by Mr. Seth on behalf of the respondents that the infant was in fact a Christian at the time of the marriage so that the marriage was void under the Christian Marriage Ordinance. The numerous cases cited before us on this point were nearly all decisions as to how the infant should in future be brought up. The only case cited in which the question of the actual existing religion of an infant was discussed was *Eggar v. May*. In that case the infant, who was 11 years of age, was held not to be a Roman Catholic at the material date although he had been baptized and brought up in the faith by his father who desired that he should continue in that faith. That decision, however, turned upon the construction of a will and depended upon the intention of the testator, and it was held that the testator meant the infant to exercise a choice, which he could not do until he reached the age of 21. Whilst it may be arguable that an infant can only profess a religion through the mouth of its parent or guardian I should find it difficult to hold that the infant in the present case, who had been brought up as a practising Mohammedan from the age of about 4 until the age of nearly 13, was at the time of the marriage a professing Christian.
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> I do not think that the legal right of the father to bring up his child in a particular religion can affect this question. However this may be, it appears to me unnecessary to decide whether the infant was in law a Christian or Mohammedan or neither, for whatever the infant's religion may have been at the time the alleged marriage was contracted, her capacity must, in my view, be governed by the law of her domicile.

Wilson J touched on the same issue by saying:

> It has been urged by Counsel for the respondents that the 2nd defendant was a Christian in as much as not having reached the age of discretion it was not open to her to change her religion by professing the Moslem religion, and, therefore, under s. 3 of the Christian Marriage Ordinance any marriage contracted by her other than under the Christian Marriage Ordinance, or the Civil Marriage Ordinance, is null and void. With this contention I cannot agree. The definition of "a Christian" in the Christian Marriage Ordinance is "a person who profess the Christian religion". A number of cases have been cited, with a view to showing that an infant cannot adopt a religion other than the religion in which the father wishes him or her to be instructed. That seems to me to be immaterial in this case. The infant, according to the evidence, is the daughter of two members of the Roman Catholic Church. She was born on 24 March 1937, and is a Dutch subject. She was baptised on 10 April 1937, by a member of the Roman Catholic Church. She herself says that since going to live with the 1st defendant and her husband, she was brought up as their own child, and brought up as a Moslem. She states that, since she was given over to the 1st defendant, she has faithfully followed and adhered to the Moslem religion and is a true believer of Islam, that she has voluntarily adopted the Moslem faith, and will follow that faith to the end of her life. Whatever may be the restriction on an infant adopting a religion contrary to her father's wishes, I find it impossible to find that she herself within the meaning of the Christian Marriage Ordinance professes herself to be a Christian. For this reason, I am satisfied that she was not debarred by reason of s. 3 of the Christian Marriage Ordinance from contracting a marriage other than one under the Christian Marriage Ordinance, or the Civil Marriages Ordinance.
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> For reasons which I shall explain later I do not think it is necessary to come to a conclusion whether or not in the circumstances she was entitled, without her father's consent, to become a Moslem, and profess the Moslem religion, and in my view, it is not necessary to consider those authorities which have been cited, with a view to showing that, as an infant she was unable to adopt a faith, which is one of which her father does not approve and without his consent.

The effect of that case was that although the Christian parents were given custody and the Muslim marriage between the infant and the appellant was held to be illegal and void and of no effect and although all three Judges (and the trial Judge) agreed that the infant was a Muslim at the time of the marriage, they elected not to make any decision on whether the infant had the right to choose her own religion. In any case, that case was decided six years before Art. 11 and 12 of the Federal Constitution were enacted.

In the case of *Re Chee Peng Quek* on which application the present application is modelled and which is not actually reported but appears in the notes of the November [1963] 29 MLJ at p. 1xxxix, Chua J granted an order in terms of the application on the grounds that the Singapore Guardianship of Infants Ordinance was of general application and applies to Muslims and therefore the father of an infant would ordinarily be entitled to the guardianship of his person and property including the right to determine the religious upbringing and religious education of the infant. Apart from the fact that there is no reported judgment in that case and we are not aware as to whether Art. 11 and 12 of the Federal Constitution had been given any judicial interpretation by the trial Judge as Singapore was then a part of Malaysia, even if the laws on guardianship of infants were similar, I was of the view that with respect, the mere reference to that article on the case was of no assistance to me and I was not bound by it.

In conclusion, on the question whether the infant has a right to choose her own religion or whether that decision is to be made by the plaintiff, for the reasons stated on the facts of this case, I would hold that the infant has that right where she does it on her own free will in view of Art. 11 and 12 of the Federal Constitution. As regards the first prayer, I would therefore dismiss the application as regards that part that the plaintiff has a right to decide on the infant's religion but would, in view of the Act, grant the application as regards his right to decide on her education and upbringing till she attains majority subject to the condition that it does not conflict with the principles of the infant's own choice of religion as guaranteed to her under the Federal Constitution. The first prayer having been dismissed in respect of the plaintiff's right to decide the infant's religion, it follows as a matter of consequence that all the subsequent prayers should also be dismissed with costs.

Also found at [1986] 2 CLJ 331